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No. 78-1098

In the Supreme Court of the United States

OCTOBER TERM, 1978

RICHARD P. HERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 40a) was entered on November 17, 1978. A petition for rehearing was denied on December 20, 1978 (Pet. App. 41a). The petition for a writ of certiorari was filed on January 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly refused to order the government to grant immunity to four persons summoned as defense witnesses.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of violating the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962(c)) and conspiring to violate the Act (18 U.S.C. 1962(d)).[1] He was sentenced to three years' imprisonment, all but six months of which was suspended, together with three years' probation and a fine of $500. The court of appeals affirmed (Pet. App. A).

1. Petitioner served as a state court magistrate in Allegheny County, Pennsylvania, and in that capacity was required to fix bail in criminal cases. Between 1970 and 1975, he accepted a series of bribes from a local bail bonding firm. Those bribes formed the basis of the charges against him (Tr. 108-109).

The bail bonding firm, which was headed by Stephen Levitt, wrote surety bonds for persons charged with crimes throughout Western Pennsylvania (Tr. 40, 54, 59). Early in 1970, Levitt arranged to pay a kickback to petitioner and other magistrates in Allegheny County in exchange for referring bail bond business to Levitt's agency (Tr. 54). When one of the magistrates referred a case to him, Levitt would post an invalid bond with the court (Tr. 55). In some cases, he would post a surety bond without including the power of attorney required to bind the surety company; in others, he would post a worthless property bond (Tr. 55). In either case, Levitt would avoid

[1]A total of 71 individuals were charged in six indictments with violations of the RICO statute. Before trial the defendants moved to dismiss the indictments and to suppress certain evidence. The district court granted these motions, the government appealed, and the court of appeals reversed (*United States* v. *Forsythe*, 560 F. 2d 1127 (3d Cir.), reversing 429 F. Supp. 715 (W.D. Pa. 1977)). On remand, petitioner and co-defendant James McCann were severed from the remaining 12 defendants because of ill health. Petitioner and McCann were tried together with two other magistrates.

having to pay any premium to the surety company (Tr. 46, 65, 174-175). When cases were dismissed at the preliminary hearing, Levitt would split the gross premium with the magistrate. When cases were set for trial, he would deduct the cost of obtaining a valid power of attorney before splitting the remainder of the premium with the magistrate (Tr. 54-55). Often after a valid bond was posted, the magistrate surreptitiously would reduce the amount of the bond, thereby lowering the required payment to the surety and increasing the sum that Levitt and the magistrate would split (Tr. 56-57).

For each defendant referred to him by a magistrate, Levitt placed the kickback money in an envelope with the appropriate magistrate's name on it. He either delivered the envelope to the magistrate or to one of the magistrate's employees, or directed one of his own employees to deliver the envelope (Tr. 58, 75, 110, 114-123, 325-329, 331, 333, 335). On occasion Levitt personally delivered kickback money to petitioner (Tr. 110, 123), and on at least one occasion petitioner's son collected a payment envelope for his father (Tr. 124, 333)).

In February 1976, petitioner admitted to an FBI agent that he had sent his son to Levitt's agency to collect an envelope containing kickbacks on several bonds written in his office. He also admitted that he had received kickback payments on numerous occasions (Tr. 463-465).

2. Levitt, who had pleaded guilty to participation in the illegal scheme, was one of the main government witnesses at trial. Other government witnesses included two of Levitt's employees, both of whom were granted immunity. Petitioner did not testify in his own defense. His secretary testified (Tr. 583-589) that she had never referred a case to any bondsman on petitioner's behalf, nor had she seen petitioner refer cases to or accept bribes from any bondsman. Two former constables in petitioner's office

testified (Tr. 555, 558) that they had never split with petitioner any funds received from Levitt. One denied (Tr. 555-556) ever having received money from Levitt in return for referring bond business to Levitt's agency, and the other stated (Tr. 558) that the payments he received from Levitt's agency were only for picking up bail jumpers.

Petitioner proposed to call as defense witnesses four other constables who had on occasion done work out of petitioner's office (Tr. 543-544). Those constables had been indicted for their alleged participation in the bail bond kickback scheme. The charges against them, however, had been dismissed without prejudice before petitioner's trial (Tr. 575). Relying on prior admissions the constables had made to the FBI and before the grand jury (C.A. App. 1138a-1176a),[2] petitioner represented to the court that their testimony would establish that some of the payments from Levitt had gone to one or more of the constables, who split the money among themselves without passing any along to petitioner. Petitioner's attorney informed the court (Tr. 492-493) that he had learned that the constables probably would invoke their Fifth Amendment privilege against self-incrimination if called to testify, and that if they did so, he would request the court to instruct the United States Attorney to immunize them.

During a hearing outside the presence of the jury, William McHugh, one of the four constables subpoenaed by petitioner, answered some questions but asserted his Fifth Amendment privilege when asked whether he had ever received money from Levitt, or whether he had split any kickback money with the other three constables (Tr. 535-538). When the prosecutor refused to promise that any evidence McHugh might give would not be used

[2]"C.A. App." refers to the joint appendix filed by the parties in the court of appeals.

against him in any future criminal action (Tr. 540-541), petitioner's attorney moved the court (Tr. 542) to require the United States Attorney to grant use immunity to McHugh or to dismiss the indictment (Tr. 542). The court denied the motion (Tr. 543). McHugh subsequently testified before the jury, contrary to Levitt's testimony (Tr. 158-159), that he had not introduced Levitt to petitioner. He also testified that he was not aware of any conversation in which Levitt agreed to pay kickbacks to petitioner in return for bail references, and that he had never split with petitioner any kickback payments received from Levitt (Tr. 550). Counsel for the other three constables informed the court that their clients would claim their privilege against compulsory self-incrimination if called to testify (Tr. 570, 573-574).

3. The court of appeals rejected petitioner's argument that the compulsory process clause of the Sixth Amendment guaranteed him the right to demand that defense witnesses who invoked their Fifth Amendment privilege be granted use immunity. The court held that unless government misconduct produces a witness's refusal to testify for the defense, as in *United States* v. *Morrison*, 535 F. 2d 223 (3d Cir. 1976), the government is not required under the Sixth Amendment to grant a defense witness use immunity. In this case, the court observed, there was no suggestion of government misconduct. The court noted that a trial court might have inherent authority in an appropriate case to confer immunity on a witness whose testimony was essential to an effective defense. Because the defendant had failed to request at trial that the court exercise that authority, however, the court declined to rule on whether such relief would have been appropriate (Pet. App. 21a-22a).

Judge Garth dissented (Pet. App. 23a-29a). He concluded that the Administrative Procedure Act, 5 U.S.C. 704, permits judicial review of the government's

refusal to exercise its power to seek immunity for defense witnesses. He therefore would have remanded the case to the district court to determine whether the government had abused its discretion by refusing to immunize the four constables subpoenaed by petitioner at trial.

ARGUMENT

Petitioner contends (Pet. 17-23) that the district court erred in failing to compel the government to grant immunity to the constables. This contention was properly rejected by the court below.

1. The courts of appeals have uniformly held that the decision to grant or deny immunity under the federal immunity statute, 18 U.S.C. 6001-6003, is within the sole discretion of the Executive Branch and that a court has no authority to force the government to grant such immunity or to provide immunity on its own motion. See, *e.g.*, *United States* v. *Lang*, No. 78-1205 (2d Cir. Nov. 30, 1978); *United States* v. *Rocco*, 587 F. 2d 144, 147 (3d Cir. 1978); *United States* v. *Benveniste*, 564 F. 2d 335, 339 n.4 (9th Cir. 1977); *United States* v. *Housand*, 550 F. 2d 818, 824 (2d Cir. 1977); *United States* v. *Beasley*, 550 F. 2d 261, 268 (5th Cir.), cert. denied, 434 U.S. 938 (1977); *In re Daley*, 549 F. 2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F. 2d 1302, 1315 (8th Cir. 1977); *United States* v. *Alessio*, 528 F. 2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Ramsey*, 503 F. 2d 524, 532-533 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975). See also *Earl* v. *United States*, 361 F. 2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921-922 (1967). As the court explained in *United States* v. *Alessio*, *supra*, 528 F. 2d at 1082: "To interpret the Fifth and Sixth Amendment as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of

the Executive Branch in criminal prosecutions." That role is bottomed on the constitutional doctrine of separation of power and rests upon considerations associated with the decision to prosecute.[3]

The denial of petitioner's request did not violate his Sixth Amendment right to compulsory process or his Fifth Amendment right to due process. This is not a case like *United States* v. *Morrison*, *supra*, where the court found a violation of the right to compulsory process after an otherwise willing defense witness was driven by prosecutorial misconduct to invoke her privilege against self-incrimination. The court reversed the conviction in *Morrison* after finding that the defendant's right to present witnesses had been denied by the prosecutor's "bizarre conduct." See 535 F. 2d at 226-228. In order to guarantee that the harm done by the prosecutor was not irreparable, the court of appeals held that the government on remand would be required to request use immunity for the witness if she refused to testify. In the absence of such a request, the court held that the district court should enter a judgment of acquittal. See 535 F. 2d at 229. As the court below noted (Pet. App. 13a), the unusual remedy fashioned in *Morrison* is not called for in this case, because there was no suggestion that prosecutorial misconduct provoked the witness to refuse to testify.

2. Nor does the government incur an obligation under the Due Process Clause to immunize defense witnesses whenever, as here, the government relies in some respect on immunized testimony. Rather, as the court observed in *United States* v. *Alessio*, *supra*, 528 F. 2d at 1082, all that

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[3]It is, of course, well settled that the decision whether to prosecute rests solely with the Executive. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F. 2d 375, 378-380 (2d Cir. 1973); *United States* v. *Cox*, 342 F. 2d 167 (5th Cir.) (*en banc*), cert. denied, 381 U.S. 935 (1965).

is required is that the government not exercise its power in a manner that denies the defendant a fair trial. Whether the defendant has been afforded a fair trial depends, of course, on the circumstances of each case.

The government's refusal to immunize the four constables in this case did not deny petitioner a fair trial. Before asserting his Fifth Amendment privilege, Constable McHugh testified that he never participated in any conversation between Levitt and petitioner in which Levitt agreed to pay petitioner kickbacks if petitioner referred defendants to him. McHugh also testified that he never split with petitioner any kickbacks received from Levitt. McHugh's grand jury and FBI statements showed, at most, that during a four-month period in 1973, McHugh was splitting his kickback payments with the other three constables, and that he was unaware that petitioner had received any kickbacks from Levitt (C.A. App. 1138a, 1140a, 1142a). That testimony, however, was not significantly more helpful to petitioner than McHugh's actual trial testimony. Thus, it cannot be said that the government's refusal to grant immunity to McHugh deprived petitioner of testimony "essential to an effective defense."

The proffered testimony of the other three constables was similarly not exculpatory. The witnesses' grand jury and FBI statements reflected that each of them had received kickback payments from Levitt in return for the referral of bail clients and that whenever any of them worked together in making an arrest, they would split among themselves any kickback payments received from Levitt. None of the constables suggested either before the grand jury or in their statements to the FBI that petitioner did not receive similar payments. At most, the proffered testimony showed only that these constables never split

any of their kickbacks with petitioner and that they did not know whether petitioner himself received similar payments from Levitt.[4]

The proffered testimony would not significantly have aided petitioner, particularly in light of the testimony of several witnesses that they personally delivered kickback payments to petitioner, and in light of petitioner's admission to the FBI that he had received such payments. Petitioner did not testify at trial, nor did he call his son to testify with respect to the allegation that he had received a payment for his father from Levitt.

For this reason, even if a court has inherent authority to confer judicially fashioned immunity upon a witness where clearly exculpatory testimony is essential to an effective defense (see Pet. App. 21a-22a), this is not such a case.

Significantly, petitioner did not offer the constables' grand jury testimony that they split no kickback payments with petitioner as substantive evidence under Fed. R. Evid. 804(b)(1). That rule provides that if the declarant is

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[4]Constable Trosky's grand jury and FBI statements showed that on five or six occasions, when he and Constable LaQuinta worked together, the two of them split referral fees received from Levitt; that he never asked petitioner whether it was proper to accept such payments; that LaQuinta never indicated to him whether he had talked to petitioner about it; and that he believed it was possible LaQuinta could have been splitting referral fees with other constables, but that he personally was unaware of such payments (C.A. App. 1146a-1148a, 1152-1153a, 1155a). Constable Batkins' prior statements showed that he had received kickback payments from Levitt over a three-year period; that on occasion, when he assisted LaQuinta or McHugh in executing warrants, he split the payments with them; and that he did not know whether petitioner knew he was receiving payments (C.A. App. 1163-1165a, 1168a). Constable LaQuinta's prior statements showed that the only constables he ever worked with were McHugh, Trosky and Batkins, with whom he would split kickbacks received from Levitt; that he did not know whether petitioner received similar kickbacks; and that he never paid petitioner a share of the kickbacks he received from Levitt (C.A. App. 1169a-1171a, 1173a).

unavailable as a witness,[5] testimony he has given as a witness at another hearing is not excluded by the hearsay rule if the party against whom the testimony is offered had an opportunity to develop the testimony by direct, cross, or redirect examination. Since the government examined the constables at the time they testified before the grand jury, petitioner could have offered such testimony as substantive evidence at trial. Cf. *United States* v. *Amaya*, 533 F. 2d 188, 191 (5th Cir. 1976). Petitioner at no time, however, made any effort to introduce this grand jury testimony.

3. Finally, the court of appeals correctly rejected (Pet. App. 14a-20a) Judge Garth's dissenting view that the government's decision not to immunize defense witnesses is subject to review under the Administrative Procedure Act, 5 U.S.C. 701-706 (1977). That Act specifically precludes judicial review where agency action is committed to agency discretion by law. 5 U.S.C. 701(a)(2). As the court below noted (Pet. App. 16a-17a), the legislative history of the use immunity statute, 18 U.S.C. 6001 *et seq.*, conclusively shows that the decision to seek immunity for a witness is left to the sole discretion of the government and is not subject to judicial review. See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 42-43 (1970); Report of the Committee on the Judiciary, S. Rep. No. 91-617, 91st Cong., 1st Sess. 145 (1969). ("The court's role in granting the [immunity] order is merely to find the facts on which the order is predicated. * * * Review that second judges prosecutive discretion is not authorized.")

This Court has recognized the limited role of the judiciary under the immunity statute. See *Ullmann* v. *United States*, 350 U.S. 442 (1956) (district court has no discretion to deny the immunity order on the ground that

[5]Fed. R. Evid. 804(a)(2) specifically provides that "[u]navailability as a witness" includes cases in which the declarant is exempted from testifying on the ground of privilege.

the public interest does not warrant it; the court's duty is only to ascertain whether the statutory requirements are satisfied). Nor should any different result obtain in cases in which the government decides not to grant immunity. As the court of appeals stated, "[t]he same separation of powers concerns that compelled *Ullmann's* construction of the statute to deny any possibility that a court might bar the prosecutor's application for a grant of immunity apply with equal force to a court order requiring such a grant * * *. [T]he gravamen of the *Ullmann* holding is that judicial interests of nonconstitutional stature are insufficient to permit intervention in the prosecutor's immunization decision" (Pet. App. 16a-17a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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